IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 63413-5-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
PAUL McVAY,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 26, 2010

Lau, J. — Paul McVay challenges one of his five convictions for second degree identity theft. He contends his counsel provided ineffective assistance by failing to seek a lesser included offense jury instruction of second degree theft for that count. Because it was legitimate trial strategy to forego such an instruction under the circumstances, counsel's actions did not constitute deficient performance. Moreover, McVay has failed to show prejudice because there is no likelihood his sentence would have been different even if he was convicted only of theft. McVay also argues that the State alleged statutory alternative means for that same count but failed to prove both means. But even assuming the identity theft statute includes alternative means, there was no error because sufficient evidence established each means. We affirm.

FACTS

On November 8, 2008, Paul McVay attempted to deposit a check drawn on a

personal checking account. The assistant bank manager noticed discrepancies in the form of the check, and McVay left the bank when she called the account holder and found the check was forged.

On November 20, McVay attempted to purchase a cell phone at a Walmart store. The salesperson noticed that McVay's Washington identification card, in the name of Paul Jones, appeared to be forged. She summoned store security and police. McVay was ultimately arrested and found to be in possession of numerous checks with the names of several different banks and several different account holders on them, as well as other documents suggesting McVay had created the checks himself.

McVay was charged with five counts of second degree identity theft, two counts of forgery, and two counts of unlawful possession of fictitious identification. At the close of the State's case, the trial court dismissed the fictitious identification counts. The jury convicted McVay of the remaining seven counts. He appeals.

Ineffective Assistance

McVay first argues that his attorney should have requested a lesser included offense instruction for second degree theft as to count 6—the charge of second degree identity theft relating to the business "Five Horizons Espresso." Relying on this court's decisions in State v. Grier, 150 Wn. App. 619, 635–41, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017 (2010), and State v. Pittman, 134 Wn. App. 376, 384–87, 166 P.3d 720 (2006), McVay asserts that this was an unreasonable "all or nothing" strategy. McVay contends that he was prejudiced because the jury was not given the option of finding him guilty of the lesser offense that would have resulted in a shorter

sentence. As noted in State v. Hassan, 151 Wn. App. 209, 219, 211 P.3d 441 (2009), however, the "determination of whether an all or nothing strategy is objectively unreasonable is a highly fact specific inquiry." On the particular facts of this case, we disagree with both of McVay's contentions.

To establish ineffective assistance of counsel, McVay must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness based on a consideration of all the circumstances. State v. Stenson, 132 Wn.2d 668, 705–06, 940 P.2d 1239 (1997). There is a strong presumption of effective representation. State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). To prove prejudice, McVay must show that but for counsel's deficient performance, there is a reasonable probability the outcome of the proceedings would have been different. McFarland, 127 Wn.2d at 335.

As for the deficient performance prong of the analysis, McVay attempts to challenge count 6 of his seven convictions in an analytical vacuum. Our deferential standard of review, however, requires us "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U. S. at 689. Counsel was defending McVay on seven counts, not one. Because both identity theft and second degree theft are class C felonies and McVay had a substantial criminal history, McVay's offender score of well over nine points on his six other felony convictions would not have changed if he had been convicted of only second degree theft in count 6. He therefore would have faced the

identical standard range of 43 to 57 months of confinement on his aggregate sentence. And as the sentencing hearing showed, counsel would have been well aware that McVay's prior theft-related criminal history made a high end sentence likely. Accordingly, counsel could reasonably perceive the real benefit of pursuing a lesser offense strategy for count 6 as effectively nil. McVay's circumstances therefore bear no resemblance to Grier and Pittman, in which the defendants would have received a significantly reduced sentence if convicted only of a lesser included offense.

Also, unlike Grier and Pittman, counsel here could have perceived requesting such an instruction as unwise because it might appear to the jury to be inconsistent with the defense she attempted to mount—a challenge to the State's proof that the various business victims qualified as "persons" under the identity theft statute. Contrary to McVay's argument, counsel could reasonably view that defense as superior to a lesser included offense strategy because it applied not only to count 6, but to other counts as well and, thus, would have actually reduced McVay's overall sentence if successful. McVay, in short, has not rebutted the presumption of effective representation.[1]

We also reject McVay's claim of prejudice. First, as noted above, there is no likelihood that McVay would have received a shorter sentence when all seven counts of which he was convicted are considered. Moreover, even assuming prejudice could be

[1] Because we conclude counsel could reasonably decline to request the instruction as a matter of tactics, we do not need to resolve the parties' dispute over whether the class C felony of second degree theft actually is a lesser included offense of the class C felony of second degree identity theft or whether the particular facts of this case would have supported giving such an instruction if it is.

established by the possibility that a wholly concurrent sentence might be shorter, we perceive no likelihood that the jury would have been persuaded by the argument McVay claims his counsel should have advanced. McVay asserts that counsel should have argued he possessed the 11 Five Horizons checks without any intent to use any of them. But given the circumstances surrounding his possession and the evidence of his actual attempts to use fraudulent documents the State proved at trial, we see no reasonable likelihood the jury would have found such an argument persuasive.

Alternative Means

McVay next contends that his right to a unanimous jury verdict was violated because possession of financial information and possession of a means of identification are alternative means of committing identity theft and the evidence supported only the financial information means. We disagree.

Consistent with the right to a unanimous verdict, if a defendant is charged with committing a crime by more than one alternative means, the State must present substantial evidence to support each of the means charged. State v. Arndt, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976). But if the evidence is insufficient to support a verdict on each of the alternative means submitted to the jury, the conviction must be reversed unless we "can determine that the verdict was based on only one of the alternative means and that substantial evidence supported that alternative means." State v. Rivas, 97 Wn. App. 349, 351–52, 984 P.2d 432 (1999).

We assume without deciding that, as McVay contends, RCW 9.35.020(1) establishes alternative means of committing identity theft for knowing possession of "a

means of identification or financial information . . . ." (Emphasis added.)[2] McVay argues the evidence was insufficient to establish the "means of identification" alternative because the checks he possessed relating to count 6 spelled the business name as "Five Horizens Expresso" rather than "Five Horizons Espresso," and listed an incorrect address. Appellant's Br. at 8.

We must, however, interpret the evidence in the light most favorable to the State. State v. Echeverria, 85 Wn. App. 777, 782, 934 P.2d 1214 (1997). We assume the truth of the State's evidence and all reasonable inferences that may be drawn from it. State v. B.J.S., 140 Wn. App. 91, 97, 169 P.3d 34 (2007).

Under RCW 9.35.005(3), a means of identification includes information "personal to or identifiable with an individual or other person, including: A current or former name . . . and other information that could be used to identify the person . . . ." The managing partner of Five Horizons testified that the address listed on the fraudulent checks was a partial address for one of her partners and that the checks contained the correct account number and routing number for her business's Bank of America checking account. Viewed in the light most favorable to the State, the information McVay possessed was sufficiently identifiable to the Five Horizons business entity to constitute a "means of identification" under the statute. Accordingly, there was no violation of McVay's right to a u

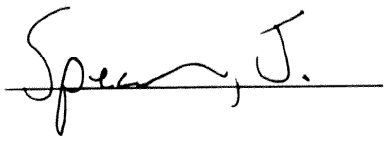
[2] But see State v. Al-Hamdani, 109 Wn. App. 599, 605, 36 P.3d 1103 (2001) (not every use of the disjunctive in a criminal statute creates an alternative means).

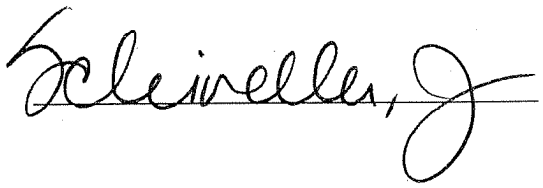
[3] Because of our resolution of this issue, we note, but do not address the State's alternative argument that any error was harmless.

nanimous jury.[3]

We affirm.

WE CONCUR:





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